

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1973

EUGENE HARRIS,	)	
Petitioner,	)	
	)	
v.	)	NO. 75-6265
	)	
JIMMY H. ROSE, Warden,	)	
Respondent.	)	

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Nashville, Tennessee 37219  
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OF COUNSEL:

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Attorney General

OFFICE OF THE  
ATTORNEY GENERAL OF TENNESSEE  
SUPREME COURT BUILDING  
NASHVILLE, TENNESSEE 37219

## TABLE OF CONTENTS

Opinions Below	1
Statement of the Case	2
Question Presented for Review	2
Argument	2
Conclusion	5

## TABLE OF AUTHORITIES

Darr v. Burford, 339 U.S. 200 (1950)	3
Fay v. Noia, 372 U.S. 391 (1963)	3
Irvin v. Dowd, 359 U.S. 394 (1959)	3
Machibroda v. United States, 386 U.S. 487 (1961)	3
Nelson v. George, 399 U.S. 224 (1970)	3
Pitchess v. Davis, __U.S.__, 95 S.Ct. 1748 (1975)	3
Bernier v. Moore, 441 F.2d 395 (1st Cir. 1971)	4
United States ex rel. Cummings v. McMann, 429 F.2d 1295 (2nd Cir. 1970)	4
28 United States Code § 2254	3
Tennessee Code Annotated §§ 40-3801 et seq.	3

MAY IT PLEASE THE COURT:

The respondent, Jimmy H. Rose, Warden, in opposition to the Petition for Writ of Certiorari in the instant case, would respectfully suggest that the Writ should be denied.

OPINIONS BELOW

The Order of the United States of Appeals for the Sixth Circuit denying a Certificate of Probable Cause filed on 29 January 1976 is attached as Appendix A. The Order of the United States District Court for the Middle District of Tennessee, Nashville Division, denying the petitioner's Motion for Leave to Proceed in Forma Pauperis, with an appeal and for a Certificate of Probable Cause filed 5 August 1975 is made Appendix B. The Order of the United States District Court for the Middle District of Tennessee, Nashville Division, dismissing the Petition for Writ of Habeas Corpus, is made Appendix C, as is a prior Order of that Court incorporated by reference in the Order of 16 July 1975.

The Order of the Supreme Court of Tennessee denying a Petition for Certiorari arising from the direct appeal of the conviction here under attack is made Appendix D.

### STATEMENT OF THE CASE

This case was initiated by a pleading filed in the United States District Court for the Middle District of Tennessee treated as a petition for habeas corpus and dismissed without the requirement of a response and without an evidentiary hearing. The District Court then denied a motion for appeal in forma pauperis and denied a certificate of probable cause. The Court of Appeals likewise denied a certificate of probable cause.

### QUESTION PRESENTED FOR REVIEW

The matter to be reviewed on this petition is whether the pleading filed in the District Court warranted a response and an evidentiary hearing.

### ARGUMENT

The respondent submits that the action of the District Court in dismissing the pleading was imminently appropriate, as was that of the Court of Appeals in denying a certificate of probable cause.

The initial pleading did not assert the exhaustion of remedies available under state law save that the Supreme Court of Tennessee had denied relief on direct appeal. Available to the petitioner were procedures under the Post Conviction Procedure Act. Tenn. Code Ann. §§ 40-3801, et seq.

The provisions of 28 U.S.C. § 2254 require that an application for a writ of habeas corpus shall not be granted unless it appears that the person seeking the writ has exhausted available state remedies. Under Tennessee law, a post conviction procedure is available to assert constitutional infirmities occurring during a criminal trial. See e.g. Nelson v. George, 399 U.S. 224 (1970); Irvin v. Dowd, 359 U.S. 394 (1959); Pitchess v. Davis, \_\_\_ U.S. \_\_\_, 95 S.Ct. 1748 (1975).

Further, federal habeas corpus relief is not to be utilized as a substitute for appeal. Fay v. Noia, 372 U.S. 391 (1963).

Even given the liberal reading of a prisoner's petition pro se, the petition in the instant case failed to state sufficient facts necessary to warrant an evidentiary hearing. Darr v. Burford, 339 U.S. 200 (1950); c.f. Machibroda v. United States, 336 U.S. 487 (1961).

As the United States Court of Appeals for the Second Circuit indicated in United States ex rel. Cummings v. McMann, 429 F.2d 1295 (2nd Cir. 1970):

In order to merit an evidentiary hearing on a petition for habeas corpus, the petitioner must present more than simple conclusory allegations. He must raise an issue of disputed fact, which fact, if true, might establish his claim for relief. [Citations omitted.] At page 1296.

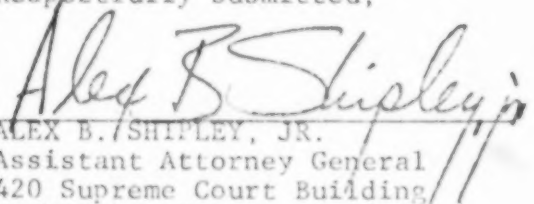
Further, the Great Writ is not a device for review of state convictions for the mere asking. In Bernier v. Moore, 441 F.2d 395 (1st Cir. 1971), the court aptly stated that:

The fundamental purpose of habeas corpus would be undermined if the writ were prostituted by holding it out as available upon mere "notice" or token pleading, without any showing of entitlement. We do not accept the burden, upon ourselves and other litigants alike that would follow if state defendants, simply by making conclusory allegations, could require district judges -- and inevitably, on appeal, three circuit judges -- to read the records and transcripts of their state trials. Habeas corpus is a special proceeding to right wrongs, not a routine procedure to search for them, nor a means of requiring the federal courts to review, as a matter of course, state proceedings. At page 396.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be dismissed.

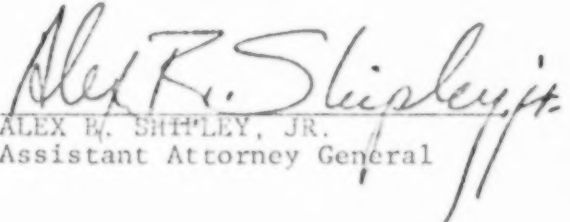
Respectfully submitted,

  
ALEX B. SHIPLEY, JR.  
Assistant Attorney General  
420 Supreme Court Building  
Nashville, Tennessee 37219  
(615) 741-2865

R. A. ASHLEY, JR.  
Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been forwarded to Mr. Eugene Harris, 48605, Brushy Mountain Penitentiary, Petros, Tennessee 37845, this 5<sup>th</sup> day of May, 1976.

  
ALEX B. SHIPLEY, JR.  
Assistant Attorney General

No. 75-8249

FILED

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

JAN 29 1975

JOHN P. HEHMAN, Clerk

EUGENE HARRIS,

Petitioner-Appellant,

v.

JIMMY H. ROSE, WARDEN,

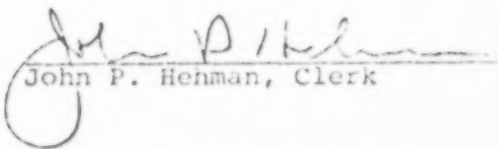
Respondent-Appellee

O R D E R

Upon consideration of petitioner's motion for a new trial and construing said motion for an application for a Certificate of Probable Cause pursuant to Rule 22 of the Federal Rules of Appellate Procedure,

It is ORDERED that the application be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

  
John P. Henman, Clerk

App. A.



IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

RECEIVED  
4:30 P.  
August 5, 1975  
D  
BY *[Signature]*

EUGENE HARRIS

]

VS.

]

NO. 75-254-NA-CV

JIMMY B. ROSE, Warden,  
Tennessee State Penitentiary

]

ORDER

121215  
ALREADY  
ON FILE  
GROSS  
11/1/75

By Order entered July 16, 1975, the court found the petition for habeas corpus submitted by this inmate of the Tennessee State Penitentiary to be without merit, in that it stated no grounds for habeas corpus relief.

Petitioner has now submitted what he designates as a Notice of Appeal. Treating the document submitted as a motion for leave to proceed in forma pauperis with an appeal and for a certificate of probable cause, it must be DENIED. Any appeal would be frivolous and without merit. It is so ORDERED.

*[Signature]*  
CHIEF JUDGE

App. B.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

FRANK E. WILLIAMS  
Clerk

BY [Signature]  
Deputy Clerk

EUGENE HARRIS

]

VS.

]

NO. 75-24-NA-CV

JIMMY H. ROSE, Warden,  
Tennessee State Penitentiary

]

ORDER



The clerk will file the petition of Eugene Harris in forma pauperis. If the document submitted by the petitioner, an inmate of the Tennessee State Penitentiary, is a petition for the writ of habeas corpus, as this court assumes, it does not state any grounds for relief. In one of the previous cases brought by this petitioner, Harris v. Rose (M.D. 74-388-NA-CV), this court, on September 5, 1974, entered an Order denying relief, which Order is apparently applicable to the petition at bar.

Incidentally, the petition at bar is entitled "Appeal of (Crim) Case No. B334 from the Courts of the State of Tennessee." He attaches a document showing that, in June, 1974, the Supreme Court of Tennessee denied his petition for a writ of certiorari to the Court of Criminal Appeals in Davidson County Case No. B-334. This is the same document referred to in the Order of September 5, 1974, in Case No. 74-388. A copy of that Order is attached hereto as an Appendix.

No meritorious grounds for relief being shown, the action must necessarily be DISMISSED. Judgment will enter accordingly.

[Signature]  
CLERK OF COURT

App C

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

11-11-74

*P. [Signature]*

EUGENE HARRIS

]

VS.

]

NO. 74-388-NA-CV

JIMMY H. ROSE, Warden,  
Tennessee State Penitentiary

]

ORDER

The clerk will file the petition of Eugene Harris for the writ of habeas corpus in forma pauperis.

The document sent in by this petitioner is not intelligible. It does appear that he claims that his conviction, wherever it occurred, was void because he didn't have competent counsel or an impartial jury. There are other statements made in the petition which do not appear to have anything to do with a petition for writ of habeas corpus. It also appears that he is asserting that, on some appeal, the bill of exceptions was not timely filed. It does not appear in what action this occurred. There is attached to the petition a card from the Clerk of the Supreme Court of Tennessee showing that, in June, 1974, in the case of Eugene Harris v. State of Tennessee, a petition for the writ of certiorari was denied. Apparently, in whatever case this was, the appellate courts passed on it.

The court finds itself unable to say that the vague statements in the petition constitute any grounds for habeas corpus action. Accordingly, the petition is DENIED and the action DISMISSED.

*[Signature]*

APC

MB 49/467

EUGENE HARRIS

Davidson County

NO. B-334 Below

vs.

STATE OF TENNESSEE

Writ Denied.

Upon consideration of the petition for a writ of certiorari herein to the Court of Criminal Appeals, Middle Division at Nashville, the said petition is hereby denied.

The Clerk of this Court will issue duly certified copies of this Order to the Clerk of the Criminal Court of Davidson County, the Sheriff of Davidson County, and the Warden of the State Penitentiary. 6/17/74.

## Office of CLERK OF THE SUPREME COURT

FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the ORDER DENYING PETITION FOR WRIT OF CERTIORARI of said Court, pronounced at its December term, 19 73, in case of EUGENE HARRIS against STATE OF TENNESSEE as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the

Court at office in the Supreme Court Building at Nashville, on this, the

5th day of May, 19 76

Ramsey Leathers, Clerk  
By \_\_\_\_\_, Deputy Clerk